

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by DIECA Communications, Inc. d/b/a Covad Communications Company for arbitration of issue resulting from interconnection negotiations with BellSouth Telecommunications, Inc., and request for expedited processing.

DOCKET NO. 040601-TP  
ORDER NO. PSC-05-0109-FOF-TP  
ISSUED: January 27, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman  
J. TERRY DEASON  
RUDOLPH "RUDY" BRADLEY  
CHARLES M. DAVIDSON

ORDER DENYING MOTION AND CROSS-MOTION FOR RECONSIDERATION AND  
GRANTING MOTION FOR CLARIFICATION

BY THE COMMISSION:

**I. Case Background**

On August 21, 2003, the Federal Communications Commission (FCC) released its Triennial Review Order<sup>1</sup> (TRO) wherein the FCC determined that the high frequency portion of the loop (HFPL) was no longer required to be unbundled pursuant to section 251 of the Telecommunications Act of 1996<sup>2</sup> (the Act). However, the FCC did require a transition period in which section 251 line sharing<sup>3</sup> will be available on a grandfathered basis for the next three years, with line sharing arrangements that existed before the effective date of the TRO remaining at the same rates until service is discontinued, while new arrangements added between October 2, 2003 and October 1, 2004 are subject to transitional rates. This determination was upheld by the D.C. Circuit Court in United States Telecommunications Association v. FCC, 359 F.3rd 554 (D.C. Cir. 2004)(USTA II).

On June 23, 2004, DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) filed its Petition for Arbitration and Request for Expedited Processing of an issue resulting from interconnection negotiations with BellSouth Telecommunications, Inc.

<sup>1</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, et al., FCC 03-36 (rel. Aug. 21, 2003).

<sup>2</sup> TRO at ¶255-263

<sup>3</sup> Line Sharing is the practice by which a CLEC and an ILEC share a local loop. The ILEC provides voice service over the low frequency portion of the loop, and a CLEC provides data services over the high frequency portion of the loop.

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(BellSouth). Covad is requesting we resolve the parties' dispute regarding line sharing rates, terms and conditions. On July 19, 2004, BellSouth filed its Response to Covad's Arbitration Petition in which it raised additional issues and requested this proceeding be treated as a change of law dispute rather than an arbitration.

On August 12, 2004, the parties filed a Joint Proposal letter. The parties stated that they had resolved Issue Nos. 2, 3, 6, 7, and 8 in their entirety and that discussions concerning Issue Nos. 4, 5, 9, and 10 were continuing. Additionally, the parties proposed a procedural schedule where each party would file a legal brief addressing the following issue:

1) Is BellSouth obligated to provide Covad access to line sharing after October 2004?<sup>4</sup>

The parties stated their intention in agreeing to limit the scope was to obtain a decision on the threshold legal question while still preserving all other arguments, including jurisdictional arguments, which each party expressly reserved. The joint proposed procedural schedule was approved by Order No. PSC-04-0833-PCO-TP, issued August 26, 2004.

On October 26, 2004, Order No. PSC-04-1044-FOF-TP (Line Sharing Order) was issued which required BellSouth to provide Covad access to new line sharing arrangements pursuant to the parties' interconnection agreement through its term ending December 19, 2004. On November 10, 2004, BellSouth filed its Motion for Reconsideration and Clarification of Order No. PSC-04-1044-FOF-TP. On November 12, 2004, Covad filed its Response to BellSouth's Motion for Reconsideration and Clarification and Cross-Motion for Reconsideration and Request for Oral Argument. On November 19, 2004, BellSouth filed its Response in Opposition to Covad's Cross-Motion and Request for Oral Argument. We note BellSouth stated it would continue to provide access to new line sharing arrangements pending resolution of its Motion for Reconsideration.

## **II. Covad's Request for Oral Argument**

### **Covad**

Covad filed its Request for Oral Argument pursuant to Rule 25-22.060(1)(F), Florida Administrative Code. Covad states that oral argument will aid us in understanding the important legal and policy issues involved in this dispute and assist us in reaching the appropriate decision in this matter.

### **BellSouth**

BellSouth opposes Covad's Request for Oral Argument. BellSouth argues that oral argument concerning reconsideration of a matter we have already discussed with the parties is not necessary. BellSouth argues that this matter can be appropriately decided as a matter of law without oral presentation.

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<sup>4</sup> Pursuant to the FCC's transitional plan, Covad cannot request new line sharing arrangements after October 1, 2004. TRO at ¶265 BellSouth agreed not to take any action until October 5, 2004.

The decision to either grant or deny oral argument pursuant to Rule 25-22.060(f), Florida Administrative Code, is solely within our discretion. Moreover, we find that oral argument will not aid our comprehension and evaluation of the issues before us, because this issue was fully addressed by both parties at the Agenda Conference held on October 5, 2004. Consequently, we hereby deny Covad's Request for Oral Argument.

### **III. BellSouth's Motion for Reconsideration**

#### **BellSouth**

In its Motion, BellSouth asserts we should reconsider and reverse our decision that allows Covad access to new line sharing arrangements after October 1, 2004, due to the FCC's recently issued Forbearance Order.<sup>5</sup> BellSouth asserts that as a result of the Forbearance Order the FCC will forbear from enforcement of any Section 271 obligation with respect to line sharing. BellSouth concedes the Forbearance Order does not explicitly mention line sharing; however, BellSouth contends that line sharing is a broadband element and the FCC did not deny any part of the forbearance petitions which asked for forbearance for all broadband elements delisted under section 251.

Additionally, BellSouth asserts that any petition for forbearance not denied within the statutory time period is deemed granted and that this assertion is supported by FCC Commissioner Martin in his concurring statement<sup>6</sup> attached to the Order. BellSouth acknowledges that FCC Chairman Powell issued a separate statement which, as amended, conflicts with Commissioner Martin's statement.<sup>7</sup> BellSouth contends that Chairman Powell's amended statement does not address Section 160(c) of the Act, which obligates the FCC to rule on a forbearance request within 15 months of the filing date of the petition. BellSouth argues further that while Chairman Powell indicated line sharing is excluded from the Forbearance Order, he did not explain the basis for his conclusion.

BellSouth also requests that even if we decide not to address line sharing until the FCC has more clearly articulated a national telecommunications policy, we should require Covad to remove line sharing from the parties' Section 251 interconnection agreement. BellSouth asserts that by not requiring Covad to amend the Section 251 interconnection agreement, we are allowing the continued existence of an interconnection agreement that does not comply with the law.

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<sup>5</sup> Memorandum and Order, *Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc. 's Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, released October 27, 2004 (Forbearance Order)

<sup>6</sup> FCC Commissioner Martin stated in his concurring statement that "regardless of whether it was affirmatively granted, because the [FCC's] decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute."

<sup>7</sup> FCC Chairman Powell stated in his amended concurring statement that "By removing 271 unbundling obligations for fiber-based technologies – and not copper based technologies such as line sharing – today's decision holds great promise for consumers, the telecommunications sector and the American economy."

Finally, BellSouth states that in the Line Sharing Order we found that “a true-up may be appropriate”.<sup>8</sup> BellSouth requests we revise the permissive language and replace it with mandatory language. BellSouth asserts the appropriate true-up would be to the full cost of the loop for any new line sharing arrangements provisioned from October 1, 2003 through October 1, 2004 as set forth in the FCC’s transition plan. BellSouth contends that without a mandatory true-up, Covad benefits from lower line sharing rates than those set by the FCC.

### **Covad**

In its response, Covad argues we should deny BellSouth’s Motion because it relies on an entirely baseless misconstruction of a clear order, specifically the Forbearance Order. Covad argues that rather than support BellSouth’s position with regard to line sharing, the statements of Chairman Powell and Commissioner Martin clearly demonstrate that there is indeed a continuing RBOC obligation to provide CLECs with line sharing in accordance with Section 271 of the Act. Covad asserts that BellSouth is now engaging in “double-talk” in that BellSouth is relying on Commissioner Martin’s statement to support its argument that the FCC granted forbearance from line sharing, while conversely arguing that line sharing is not a Section 271 obligation.

Covad argues, despite BellSouth’s assertions to the contrary, that in the Forbearance Order the FCC did not grant forbearance from line sharing by implication or otherwise, because forbearance from line sharing was never requested. Covad contends that the Forbearance Order repeatedly provides a list of the elements from which the FCC is forbearing and line sharing does not appear on the list. Covad asserts further that the FCC repeatedly explains that it is granting forbearance to encourage the RBOCs to build next-generation fiber facilities, and there is no mention of any consideration related to legacy copper networks carrying line sharing.

Covad contends that both BellSouth and Commissioner Martin base their assertion that the Forbearance Order implicitly granted forbearance for line sharing on the incorrect premise that there was a request for line sharing in the Forbearance Petitions. Covad asserts that Verizon’s Forbearance Petition listed the elements for which forbearance was sought, and line sharing was not included. Covad argues further that the FCC granted the list in its entirety, and it is a standard canon of statutory construction that when a legislative body or agency provides a list of items to which an order or statute applies, that list is presumed to be exclusive.<sup>9</sup> Covad argues that if BellSouth believes the FCC implicitly granted forbearance for line sharing, despite language to the contrary, it should file a Motion for Clarification at the FCC and not a Motion for Reconsideration before this Commission.

In response to BellSouth’s requested relief that we order an amendment to the parties’ interconnection agreement and pay the transition rate, Covad asserts that such a request is in violation of the Procedural Order, Florida law, and would prejudice Covad. Covad contends that BellSouth is requesting we reconsider our Order on a preliminary issue in the arbitration and issue an order on the ultimate issue in the arbitration. Covad asserts that the two parties agreed to submit a preliminary legal question for resolution which was memorialized by the Procedural

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<sup>8</sup> Line Sharing Order at 2

<sup>9</sup> See, e.g., *Settlement Funding, LLC v. Jamestown Life Ins. Co.*, 78 F.Supp.2d 1349, 1358 (N.D.GA., 1999).

Order. Covad further asserts that we held “that all outstanding issues and motions shall be held in abeyance pending resolution of the legal issue set forth by the parties in their Joint Proposal.”<sup>10</sup>

Covad asserts the amendment to the parties’ interconnection agreement for which BellSouth now requests our approval is the same amendment, including pricing, which BellSouth proposed in its original arbitration filing. Covad contends we should deny BellSouth’s requested relief because if granted, this action would 1) violate our orders and the parties’ procedural Agreement; 2) deny Covad the opportunity to provide evidence and legal briefing in support of the amendment, including pricing, proposed by Covad; and 3) fail to rule on the legal basis for the language proposed by Covad.

### **Analysis and Discussion**

#### **Standard of Review**

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1<sup>st</sup> DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3<sup>rd</sup> DCA 1959), citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1958). Furthermore, a motion for reconsideration should not be granted “based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.” Stewart Bonded Warehouse, Inc., 294 So. 2d at 317.

We find that BellSouth has not demonstrated that in addressing the stipulated legal issue<sup>11</sup> put forth by the parties in this docket, we overlooked a point of fact or law in rendering the Order. In the Line Sharing Order, we found that BellSouth had a continuing obligation, pursuant to the terms of its interconnection agreement with Covad, to provide access to new line sharing arrangements through the term of the agreement. This decision was reached after the parties indicated at the October 5th Agenda Conference that they had an existing interconnection agreement that addressed line sharing obligations. At no point in its Motion for Reconsideration does BellSouth call into question the justification or rationale for reaching our decision. Rather, BellSouth relies heavily on the Forbearance Order, issued subsequent to our Line Sharing Order, as the justification for its Motion. However, we do not find that the Forbearance Order sheds additional light on the question put before us, nor does it hinder or pre-empt our decision. Accordingly, we hereby deny BellSouth’s Motion for Reconsideration.

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<sup>10</sup> *Procedural Order* at 2.

<sup>11</sup> Is BellSouth obligated to provide Covad access to line sharing after October 2004?

**IV. BellSouth's Motion for Clarification**

**BellSouth**

In its Motion, BellSouth asserts that the Line Sharing Order notes that "each side indicated they would continue to honor existing interconnection agreement obligations through the terms of the parties' interconnection agreement ending December 19, 2004." BellSouth contends that while that language is technically correct - it has stated it will not unilaterally modify the terms of an interconnection agreement - it has caused confusion in other jurisdictions. BellSouth cites a North Carolina Commission Order which referred to this Commission's agenda session and stated that the parties had reached an agreement. As a result, BellSouth now requests we clarify that BellSouth is required to provide access to new line sharing arrangements, not as a result of an agreement between the parties, but rather to comply with a Commission Order.

Additionally, BellSouth requests that we clarify that the reference in the Line Sharing Order to a "section 271 line sharing obligation" was not intended to reflect a decision on disputed issues.

**Covad**

Covad did not address BellSouth's Motion for Clarification in its response.

**Analysis and Discussion**

We did not indicate in the Line Sharing Order that an agreement had been reached by the parties. To the contrary, the Line Sharing Order explicitly requires BellSouth to continue providing access to new line sharing arrangements. Nonetheless, it appears that some confusion may have occurred in other jurisdictions. Therefore, we clarify that BellSouth is required to provide access to new line sharing arrangements, not as a result of an agreement between the parties, but rather to comply with our Order.

Additionally, the last line on page 2 of the Line Sharing Order states:

Additionally, we recognize that a true-up may be appropriate if the FCC affirmatively removes the section 271 line sharing obligation and shall revisit this matter if necessary.

Upon review of the Agenda transcript, we find that we did not make an affirmative finding that there is an existing Section 271 line sharing obligation. Accordingly, the following clarification shall be made:

Additionally, we recognize that a true-up may be appropriate if the FCC affirmatively removes *any* Section 271 line sharing obligation and shall revisit this matter if necessary



**V. Covad's Cross-Motion for Reconsideration**

**Covad**

In its Cross-Motion, Covad asserts it is now abundantly clear that line sharing is a Section 271 obligation based on the statements of Chairman Powell and Commissioner Martin. Covad asserts that a not-so-subtle shift has occurred in BellSouth's advocacy from arguing that line sharing never was a Section 271 obligation to arguing the FCC will forbear from enforcing the obligation, because it is now clear that at least two Commissioners consider line sharing a Section 271 obligation. Covad asserts there can be no debate whether the FCC has granted forbearance for line sharing unless line sharing is a Section 271 obligation from which forbearance is necessary. Consequently, regardless of whether forbearance for line sharing has been granted, Covad requests we find that line sharing is a Section 271 obligation unless and until the FCC forbears from enforcing it.

Covad asserts it would not object to the inclusion in an Order of the following language adopted by the Louisiana Commission:

On October 27, 2004, the Federal Communications Commission issued an order granting BellSouth's Petition for Forbearance in WC Docket 04-48. Based upon conflicting statements issued by FCC Chairman Michael Powell and FCC Commissioner Kevin Martin regarding the intent and scope of that order, there is disagreement as to whether BellSouth is relieved from the obligation to provide line sharing under Section 271. Because of this issue, the Commission will hold this proceeding in abeyance until the FCC provides clarification as to BellSouth's continuing obligation to provide line-sharing. Upon clarification by the FCC, the Parties will true-up the rates for line sharing, if necessary, retroactive to the effective date of the Triennial Review Order. If the FCC does not clarify this issue within three months from the issuance of this Commission's order, the Commission will review this matter again at the request of either party.

**BellSouth**

A portion of BellSouth's Response addressed whether forbearance was specifically requested for line sharing in the Verizon petition and therefore serves as a response to Covad's response to BellSouth's Motion for Reconsideration, which is not permitted under the Florida Administrative Code. We did not consider specific portions of BellSouth's response which failed to address Covad's Cross-Motion.

BellSouth argues that Covad's contention that Commissioner Martin acknowledged the existence of a Section 271 line sharing obligation is misplaced. BellSouth asserts that Commissioner Martin's use of the word "any" when he stated in his concurring statement to the Forbearance Order that "... I believe today's order also forbears from *any* section 271 obligation

with respect to line sharing.” (emphasis added), belies Covad’s contention that line sharing is clearly a section 271 obligation.

In response to the language proposed by Covad, BellSouth proposes we include the following language in a subsequent order:

On October 27, 2004, the Federal Communications Commission issued an order granting BellSouth’s Petition for Forbearance in WC Docket 04-48. Based upon conflicting statements issued by FCC Chairman Michael Powell and FCC Commissioner Kevin Martin, this Commission desires a more clearly articulated statement of national policy before requiring the parties to amend their current interconnection agreement. The parties have extended the arbitration window relating to the current agreement through January 12, 2005. The Commission will hold this proceeding in abeyance until either: (1) January 12, 2005; or (2) the FCC articulates more clearly its national policy concerning line-sharing, whichever occurs first. In either instance, the Parties shall true-up the rates for line sharing retroactive to the effective date of the Triennial Review Order.

### **Analysis and Discussion**

We find that Covad has not demonstrated that when addressing the stipulated legal issue put forth by the parties in this docket, we overlooked a point of fact or law in rendering its Order. In the Line Sharing Order, we found that BellSouth had a continuing obligation, pursuant to the terms of its interconnection agreement with Covad, to provide access to new line sharing arrangements through the term of the agreement. Similar to BellSouth, Covad relies heavily on the Forbearance Order, issued subsequent to the Line Sharing Order, as the justification for its Cross-Motion. However, we do not believe the Forbearance Order sheds additional light on the specific question put before us, nor does it hinder or pre-empt our decision.

Furthermore, Covad’s requested relief is not appropriate for a Cross-Motion for Reconsideration. Essentially, rather than reconsider our previous decision, Covad requests that we issue a declaratory statement that line sharing is a Section 271 obligation. Such a request is more appropriately addressed in another venue and does not identify a mistake of fact or law in our prior Order. Accordingly, we hereby deny Covad’s Cross-Motion for Reconsideration.

This docket shall remain open to address the remaining open issues, currently held in abeyance pursuant to Order No. PSC-04-0833-PCO-TP. Our staff will work with the parties to discuss how the docket should proceed and shall bring a recommendation to the Prehearing Officer.

Finally, we note that in the Line Sharing Order we found that a true-up of the rates for line sharing may be necessary at some later date. In the parties’ filings, neither party indicates any objection to a mandatory true-up of the rates for line sharing. Consequently, our staff will work with the parties to discuss a possible settlement of this issue.



Based on the foregoing, it is

ORDERED that DIECA Communications, Inc. d/b/a Covad Communications Company's Request for Oral Argument is denied. It is further

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion for Reconsideration is denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion For Clarification is granted as set forth in the body of this Order. It is further

ORDERED that DIECA Communications, Inc. d/b/a Covad Communications Company's Cross-Motion for Reconsideration is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 27th day of January, 2005.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

(SEAL)

AJT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or
- 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.